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Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-456

# In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

*v.*

UNITED STATES POSTAL SERVICE AND
PAUL N. CARLIN, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner asserts that the United States Postal Service violated its First Amendment rights by barring it from conducting voter registration on Postal Service property prior to the 1984 election pursuant to guidelines that permit only nonpartisan groups to register voters on Postal Service premises.

1. Anticipating the election-year activities of 1984, the United States Postal Service on December 1, 1983, issued guidelines concerning the use of Postal Service property as sites for voter registration and as polling places on election day.[1] The guidelines relating to voter registration contained several requirements, including the condition that "[t]he registration must be conducted by government agencies or

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[1]The guidelines are reprinted at Pet. App. 37a-39a.

nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office" (Pet App. 37a). After the issuance of the guidelines, postmasters barred petitioner and its local unions from conducting voter registration in Postal Service buildings on the ground that petitioner had " 'participate[d] or intervene[d]' in the 1984 presidential campaign on behalf of Walter Mondale" (*id.* at 3a).[2]

Petitioner subsequently commenced this action in the United States District Court for the District of Columbia seeking an injunction against enforcement of the guidelines on the grounds that they violated the relevant civil service statutes and the First Amendment. The district court granted the government's motion for summary judgment (Pet. App. 18a-36a). The court first concluded that the Postal Service premises upon which petitioner sought to conduct voter registration were neither public fora nor fora intentionally opened to expressive activity by the government. Applying the reasonableness standard for evaluating restrictions upon the use of a nonpublic forum set forth in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), the district court upheld the Postal Service guidelines. The court found that the guidelines limiting access for purposes of conducting voter registration to nonpartisan groups were justified on the ground that activities conducted by partisan groups "could lead to the perception or appearance that the Postal Service is involved in the political process or is biased in the performance of its mission" (Pet. App. 26a). It further concluded that petitioner was not eligible to conduct voter registration

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[2]In previous election years a number of petitioner's local unions had been permitted to conduct voter registration drives in both public and nonpublic areas of Postal Service buildings (Pet. App. 2a-3a).

under the guidelines because petitioner supported one of the candidates running for President (*id.* at 29a-31a).[3]

The court of appeals affirmed (Pet. App. 1a-13a). It "agree[d] with the District Court that the nonpublic forum standard is applicable to [petitioner's] access claim, that the Postal Service's interest in avoiding an appearance of involvement in the political process is reasonably promoted by restricting on-premises registration to clearly nonpartisan organizations, and that the provision was properly applied to [petitioner]" (*id.* at 5a).

2. The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

At the outset, it is clear that the courts below correctly determined that the Postal Service premises to which petitioner sought access are nonpublic fora. In its cases addressing First Amendment-based claims for access to government property, this Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes" (*Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip

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[3]Petitioner also challenged a separate provision of the guidelines providing that "[p]ostal employees must not participate in any voter registration activity conducted on Postal Service premises" regardless of the identity of the organization sponsoring the voter registration (Pet. App. 37a). The district court upheld the constitutionality of this requirement (*id.* at 31a-36a), but the court of appeals vacated and remanded that portion of the district court's judgment. The court of appeals held that the district court erred by ruling on the guidelines' constitutionality before addressing the "serious question" whether the guidelines were valid under the Hatch Act (*id.* at 6a). No question regarding this requirement of the guidelines is before this Court.

op. 10-11). When the particular government property is a traditional public forum—such as a public park—or "when the Government has intentionally designated a place * * * as a public forum," a speaker can be excluded only when exclusion is necessary to serve a compelling government interest (*id.* at 11). If the government property is a nonpublic forum, however, "[a]ccess * * * can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view' " (*ibid.*, quoting *Perry*, 460 U.S. at 46).

Since Postal Service buildings are neither traditional public fora nor locations that the government intentionally has designated as public fora, it is clear that the guidelines must be evaluated under a reasonableness standard. See *NAACP*, slip op. 16 ("the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees"). Indeed, petitioner agrees that the Postal Service premises to which it sought access "are [not] public forums, or even limited public forums in the usual analysis" (Pet. 10).[4]

Moreover, petitioner does not appear to challenge the reasonableness of the Postal Service guidelines as a general matter. Such a challenge could not in any event succeed because this Court's decisions make clear that "avoiding the appearance of political favoritism is a valid justification for

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[4]At several points in its argument (Pet. 8, 10-11), petitioner appears to assert that the guidelines must be evaluated under a more stringent standard because this case involves the First Amendment rights of government employees. Petitioner is incorrect. Although petitioner represents federal employees, that circumstance plainly is irrelevant in evaluating the government's authority to limit access to government property. Petitioner's reliance upon cases concerning the First Amendment rights of federal employees is therefore misplaced.

limiting speech in a nonpublic forum." *NAACP*, slip op. 20; see also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion). The Postal Service's reasonable conclusion that the presence of partisan organizations on Postal Service property could have given the appearance that the Postal Service had endorsed a particular partisan viewpoint thus justified the guidelines permitting only nonpartisan organizations to conduct voter registration activities (Pet. App. 5a, 26a-29a). The reasonableness of the guidelines was further supported by the fact (*id.* at 28a-29a) that partisan organizations could engage in voter registration at an almost unlimited variety of alternative sites. See *NAACP*, slip op. 20; *Perry*, 460 U.S. at 53-54.

Petitioner's argument consists of several challenges to the reasonableness of the Postal Service guidelines in the peculiar circumstances of this case. There is no merit to these fact-bound claims.

First, petitioner asserts that the guidelines were not reasonable because petitioner "is already present in [postal] facilities" (Pet. 8) and, therefore, permitting petitioner to engage in voter registration would not have resulted in any additional disruption of government activities. However, it is settled that "selective access does not transform government property into a public forum" (*Perry*, 460 U.S. at 47). Petitioner's presence on Postal Service property was tied to its representation of postal employees and thus was related to the activities of the workplace. Indeed, in *Perry* the Court observed that providing a teachers union with access to school mailboxes was justified by the union's "special responsibilities" to the teachers (*id.* at 52).

In this case, on the other hand, petitioner sought to engage in voter registration activities that were by definition unrelated to labor-management issues. Allowing petitioner to conduct such activities on Postal Service property despite petitioner's partisan stance in the 1984 election might

have identified the Postal Service with petitioner's partisan viewpoint—the very possibility that the guidelines were designed to avoid. Since the government may make distinctions in access to a nonpublic forum "on the basis of subject matter" (*Perry*, 460 U.S. at 49), and the distinction here was reasonable and viewpoint-neutral, petitioner's challenge to the guidelines is without foundation.[5]

Second, petitioner claims (Pet. 9-10) that postal workers would not have confused petitioner's views with those of the Postal Service, and that the guidelines therefore were unreasonable as applied to petitioner. However, the guidelines were not designed solely to prevent confusion; they also sought to avoid the impression that the Postal Service endorsed a particular partisan view (Pet. App. 26a). If petitioner had been exempted from the guidelines even though petitioner supported one of the presidential candidates, the Postal Service might have appeared to be lending its support to petitioner's candidate by permitting petitioner to register voters on Postal Service premises. This is especially true because petitioner would have been the only partisan group permitted to engage in voter registration.[6]

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[5]Petitioner also appears to argue (Pet. 8-9) that its voter registration activities in previous years show that the guidelines were unreasonable. However, the government's decision to restrict access to a nonpublic forum "need not be the most reasonable or the only reasonable limitation" (*NAACP*, slip op. 19). Since the Postal Service's decision here plainly was reasonable for the reasons discussed above, the possible existence of other reasonable alternatives is irrelevant.

[6]Petitioner also argues (Pet. 12-13) that because its voter registration activities would have been nonpartisan, the rationale underlying the guidelines did not apply. Petitioner completely ignores the fact that the guidelines were based upon the concern that the Postal Service might have been viewed as endorsing the electoral positions of an organization if it permitted the organization to register voters on Postal Service premises. Insulation of the Postal Service from such partisan positions is a matter of great importance. As the district court observed, "[t]he

Finally, petitioner asserts (Pet. 10-11) that it was denied access to Postal Service facilities on the basis of the content of its speech—because it endorsed Walter Mondale and opposed Ronald Reagan. This argument is frivolous. The Postal Service guidelines barred all groups adopting partisan positions from engaging in voter registration, without regard to the group's particular position. The guidelines unquestionably were content-neutral, and petitioner has offered no evidence suggesting that they were applied in a discriminatory manner. Cf. *Perry*, 460 U.S. at 49.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

DECEMBER 1985

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Postal Service is perhaps the most pervasive of all government agencies. Its independence from the political process and freedom from the appearance of being involved in the political process is critical to its effective operation" (Pet. App. 27a).

DOJ-1985-12